

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C121/08

In the matter between:

SACCAWU

1ST Applicant

IVAN BUNTSUNTSU

2ND APPLICANT

KENETH SILWANA

3RD RESPONDENT

JUDITH TSHIKILA

AND OTHERS

4TH to 6TH APPLICANTS

And

WESTERN PROVINCE SPORTS

CLUB t/a KELVIN GROVE CLUB

1ST Respondent

THE PROPERTY FACILITIES

COMPANY (PTY) LTD

2ND Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an urgent application for an order-

*“2.1 Interdicting and restraining the Respondent(s) and those acting
on its authority and direction from transferring the affected*

(applicants) employees for the purpose of outsourcing the applicant's employees to the preferred outsourcing company ("THE PROPERTY FACILITIES COMPANY (PTY) LTD") until such time they had properly consulted with the union and/or affected employees on the matter.

2.2 Interdicting and restraining the 1st and 2nd Respondents and those acting on their authority from transferring the 2nd to 16th Applicants from the employment of Kelvin Grove to THE PROPERTY FACILITIES COMPANY (PTY) LTD as per their intentions annexed hereto as ANNEXURE "B" & "A" and thereby.

2.3 Interdicting and restraining the 1st and 2nd Respondents and those acting on their authority and direction from terminating the services of the applicants with the 1st Respondent and/or intimidation or victimization of the 2nd to 16th Applicants. “

BACKGROUND

[2] It is common cause that the first and second respondents (the respondents) entered into an agreement in terms of which the first respondent (old employer) would outsource its housekeeping, kitchen and bar hand services to the second respondent (the new employer). The agreement took effect from 1st March 2008.

- [3] The agreement between the respondents provided for the outsourcing to be as a going concern in terms of s197 of the Labour Relations Act 65 of 1995 (LRA). In addition the respondents agreed on the evaluation of leave pay, notional severance pay and bonuses due to the second to the sixteen applicants (the employees) as at 1st March 2008.
- [4] It was also agreed between the respondents that the announcement of the outsourcing agreement to the applicants will be jointly made. And to this extent the old employer sent a fax requesting a meeting with the first applicant for either the 27th or 28th February 2008. The letter requesting the meeting was headed **“GENERAL ADMINISTRATIVE ISSUES.”** The reason for the heading was according to the old employer because of previous difficulties it had in arranging meetings with the first applicant. According to the old employer the first applicant would not attend if it had mentioned that the meeting concerned the issue of outsourcing.
- [5] The first applicant had also addressed correspondence during the same period requesting a meeting with the old employer for purposes of negotiating wages and conditions of employment. The first applicant confirmed its attendance of the meeting proposed by the old employer in a letter date 22nd February 2008, wherein it also demanded union membership schedule and staff complements excluding those of

management.

[6] On 28th February 2008, the first applicant informed the old employer that its representative Mr Ncayo was not able to attend the meeting as he had been booked off sick by the doctor.

[7] However, the new and old employer then convened a meeting with the employees and informed them about the outsourcing of the housekeeping, kitchen steward and bar keeping services and that as a result thereof their employment was also transferred to the new employer. The employees were then served with a memorandum confirming the outsourcing of the services referred to earlier. The relevant part of the letter in as far as the employees were concerned read as follows:

“In keeping with the provisions of Section 197 all the relevant employees’ employment has been transferred to TPFC with effect from 1st March 2008. Please be assured that the years of service with Kelvin Grove will be carried over to TPFC and the relevant employees will be employed by TPFC on conditions which are on the whole no less favourable than those applying to your employment with Kelvin Grove.”

[8] The employees were also served with the copies of the outsourcing

agreement between the new and old employer. The old employer further addressed a letter on the same day informing the first applicant of outsourcing and in particular advising it (the first applicant) that the outsourcing was done in terms of section 197 of the LRA.

The dispute

[9] The applicants contended that they were entitled to an urgent interim interdict because they were not informed prior to the transfer of employees from the old to the new employer. They also contended that they were not consulted about their transfer in terms of section 197(6) (a) read with section 189 of the LRA. Mr Ncayo for the applicants argued that the respondents contravened sections 9, 10, 22, 23(1), of the Constitution Act 108 of 1996, when they effected the transfer without consulting the applicants.

[10] As concerning the Constitutional right to fair labour practice, Mr Ncayo argued that the applicants were deprived off their right to choose which employer they wished to work for and that their freedom of choice was undermined by the transfer. The essence of this argument is that had there been consultation, the employees, may have indicated that they did not wish to be employed by the new

employer and that they would rather have negotiated the severance packages.

The legal principles

[11] The traditional test to be satisfied by an applicant in an urgent interdict is to establish on the papers before the court a prima facie right, which may though be in doubt. See in this regard **CB Prest, Law and Practice of Interdicts, Juta 1996, page 57.** The requirements for an urgent application were set out in the case of **LF Boshoff Investment (Pty)Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267 A-F, by Corbett J** (as he then was) as follows:

“Briefly these requisites are that the applicant for such a temporary relief must show-

(a) that the right which is the subject matter of the main action and which it seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though in some doubt;

(b) that, if the right is only prima facie established, there is a well- grounded apprehension of irreparable harm to the applicant of the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) That the balance of convenience favors the granting of

interim. relief; and

(d) That the applicant has no other satisfactory remedy.”

[12] The onus rests on the applicant to establish a *prima facie* case and irreparable harm arising from interference of his or her right by the respondent. **See Molteno Brothers & Others v SA Railways & Others 1936 AD 21 at 333. Johannesburg Municipality v African Reality Trust Ltd 1926 AD 163 at 177.**

[13] In the case of a final interdict the applicant has the onus of showing on the balance of probabilities the existence of a clear right which he or she seeks to protect. The other requisite for the granting of the final interdict is for the applicant to prove that there is no other satisfactory remedy available. **See NUMSA and Others v Comark Holdings (Pty) Ltd (1997) 18 ILJ 516 (LC).**

[14] In the present case, it is therefore necessary for the applicants to establish the existence of a *prima facie* right to be consulted prior to outsourcing and the transfer from the old to the new employer. In this regard as appears from the facts set out above the applicants sought to establish the existence of a *prima facie* right by relying on the interpretation of the provisions of section 197 (6)(a) of the LRA read with the relevant provisions of the Constitution.

[15] In terms of section 197 of the LRA:

“(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

- (a) The new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) All the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;
- (c) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an *employee's* continuity of employment, and an *employee's* contract

of employment continues with the new employer as if with the old employer.”

[16] The provisions of sub-section (6)(a) which the applicants strongly relied on in support of their case, that they have the right to be consulted before effecting the transfer reads as follows:

“(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between -

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).”

- [17] Although, the applicants sought in their notice of motion to interdict, the transfer of the employees from the old employer to the new employer, it is undisputed that by the time the applicants brought their application the transfer had already taken place. It is also undisputed that by the time the application was served and filed the employment of the transferred employees with the old employer had already been terminated.
- [18] The approach adopted by the applicant goes against the purpose of an interdict. The purpose of an interdict is not to remedy the past invasion of rights. This effect of an urgent interdict is to maintain the status quo and not to return the status quo. See **Law and Practice of Interdicts (Supra) page 2.**
- [19] It is apparent that the contention by the applicants that they have the right to be consulted arises from their incorrect interpretation of section 197(6) read with section 189(1) of the LRA.
- [20] In my view, reference to section 189(1) in section 197(6) of the LRA was not intended to import into section 197(6) the process of consultation as envisaged in section 189(1) of the LRA. The reference to section 189(1) was intended to identify the parties to the negotiation process in the event the old and the new employers wished to avoid the consequences of section 197(2) (a) and (b) of the LRA, being that if a business is transferred as a going concern, the new employer is automatically substituted in the place

of the old employer in respect of all matters of employment. And more importantly the general provisions of section 197 provide for the retention of the status quo in as far as the terms and conditions of the contract of employment are concerned.

[21] In my view the general rule in terms of section 197 of the LRA is that whenever transfer of a business takes place as a going concern the old employer is automatically substituted by the new employer, and in this regard the employees are protected from losing their employment. The exception to the general rule provided for under section 197 applies where the new employer or both the new and the old employers wish to avoid the automatic substitution as an operation of the law. The exception is provided for in terms of section 197(6) which allows the new and the old employers to engage in negotiations with any of the parties envisaged in section 189(1) of the LRA.

[22] Thus, the right to consultation in a transfer of a business as a going concern does not arise under any provisions of section 197 of the LRA.

[23] There is however no doubt that for purposes of good industrial relations and good labour practice, consultation should be encouraged even where the transfer takes place as a going concern and both the new and old employers comply fully with the provisions of section 197(2) of the LRA. Consultation should be encouraged because, in my view, it has long term

mutual benefits in the employment relations between the transferred employees and the new employer. Some of the benefits of consultation are that it would clear fears and perceptions of insecurity on the part of the employees including building a better relationship between the parties and enhancing social partnership. This approach would promote better channels of communication between the new employer and his or her new staff.

[24] The applicants' argument that failure to consult amounted to breach of their constitutional rights is unsustainable. In my view the constitutional imperatives built into section 197 of the LRA, are intended to protect employees from unfair dismissal arising from a transfer of business as a going concern and thus ensuring job security to the employees affected by the transfer of the business.

[25] I therefore do not, with due respect, agree with Mr Ncayo for the applicants that the constitutional right to freedom of trade or occupation, as provided for in section 22 of the Constitution, was taken away or interfered with by the outsourcing of the business from the old to the new employer because of absence of consultation.

[26] In summary, my view is that the employees do not have the right to consultation under section 197 of the LRA. Therefore the applicants have

failed to establish a prima facie case, entitling them to the relief they sought.

Costs

[27] I see no reason why the costs should not in law and fairness follow the results.

Order

[28] It was on the basis of the above reasons that I issued the following order:

1. The application is dismissed with costs.

MOLAHLEHI J

DATE OF HEARING: 20 MARCH 2008

DATE OF ORDER: 26 MARCH 2008

DATE OF REASONS: 18 APRIL 2008

APPEARANCES

For the Applicant : Mr MONDE NCAYO (Union Official)

Instructed by : SACCAWU

For the Respondent: Mr DEL MONTE

Instructed by : J DEL MONTE ATTORNEYS